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LEGAL OPINION

OF

HON. JOHN M. WILLIAMS,

ON THE

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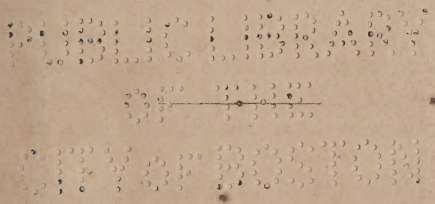
CONSTITUTIONALITY

OF THE

Massachusetts Prohibitive Liquor Law.



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C. E. C. Porcelk.
June 2. 1897

LEGAL OPINION

OF

HON. J. M. WILLIAMS

ON THE

Massachusetts Prohibitive Liquor Law.

To the Massachusetts State Temperance Committee.

GENTLEMEN: I duly received your letter of July 21, requesting my professional opinion upon the following questions:

1. Is there any provision or principle in the Constitution of Massachusetts, which prevents the Legislature from prohibiting the sale of spirituous or intoxicating liquor to any extent, which, in their judgment, the public good requires; and from directing the seizure and confiscation of such liquor when kept for sale contrary to law?

2. If there be no constitutional objection to such seizure and confiscation, is there any constitutional objection to the mode provided for seizing and confiscating liquor in the 25th, 26th, 27th, 28th, 29th and 30th sections of the "Act concerning the manufacture and sale of spirituous and intoxicating liquors," passed April 24, 1855?

3. Is there any constitutional objection to the proviso in the 29th section of said Act, which requires a party, before his appeal is allowed, to recognize to the Commonwealth in the sum of $200 to prosecute his appeal at the court appealed to, and to abide the sentence of the court thereon?

4. Under the 30th section of said Act, will the Municipal Court have jurisdiction to try cases returned to it, in the same manner as the Court of Common Pleas?

5. Does the 20th section of said Act conflict with the constitutional right of Congress to regulate foreign commerce, and the commerce between the States?

In answer to the first part of the first question, I reply, that I know no provision or principle in the Constitution of Massachusetts, which prevents the Legislature from prohibiting the sale of spirituous or intoxicating liquors, to any extent, which, in their judgment, the public good requires. The Constitution expressly recognizes the principles of *temperance* among

those fundamental principles to which frequent recurrence is absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The constitution also expressly grants to the General Court full power and authority to establish all manner of wholesome laws, either with penalties or without, so as the same be not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth. Under these provisions, it has ever been considered to be for the good and welfare of this Commonwealth, to promote the cause of temperance, by laws restraining the indiscriminate sale of intoxicating liquors.

All the former license laws of the Commonwealth were founded on this principle. They authorized the sale in certain small quantities, by certain persons, to be selected, appointed, and licensed therefor, and prohibited such sales, by all or any other persons. If those license laws were constitutional, they settle the principle that the legislature may, by law, limit and restrict, to some extent, the sale of spirituous and intoxicating liquors; and if this principle is established, then the degree of the limitation and restriction must, under the same general grant of power, be left to the wisdom and sound discretion of the Legislature. If the limits and restrictions thus imposed, transcend public opinion, and are deemed by the people to be oppressive, the only true, peaceful, and constitutional remedy is in the ballot-box, and that remedy may always be made effectual.

Now this question has been distinctly raised and conclusively settled by the Supreme Judicial Court of Massachusetts, in the case of the Commonwealth v. Blackington, (24 Pick. 352.) In that case, the unanimous opinion of the Court, on this point, was pronounced by Shaw, C. J., and I cannot do better than to quote at length that elaborate, and, (as it appears to me,) conclusive opinion, in the language in which it was delivered.

"It is remarkable," says the Chief Justice, "that, in the course of nearly sixty years that the Constitution has been in operation, and in the numerous prosecutions which have taken place under it, this objection has not been before taken. These laws, in nearly the same form in which they are now found, were commenced soon after the colony of Massachusetts was first founded, and were revised and amended, from time to time, during the continuance of the colonial government; they were revised and re-enacted soon after the grant of the new province charter, in 1692; and revised from time to time under the provincial government; and within a few years after the adoption of the present Constitution, they were revised and re-enacted; and, with some amendments and modifications, have been in force ever since. Besides, they are laws which have not remained idle and inoperative in the Statute Book; but, affecting as they do, large classes of persons, and extensive interests and branches of business, they have been steadily and constantly practised upon and carried into operation and effect. It has generally been considered that when an act has been passed soon after the adoption of the Constitution, and by a Legislature, many of the members of which may be presumed to have been members of the convention which adopted the constitution, and who had well weighed its objects and provisions, such act may be viewed somewhat in the light of a contemporaneous construction of the provisions of the Constitution. It may well be considered by those who come later to the construction and exposition of the Constitution as affording some light in regard to the views and intentions of its founders. Still, if the Statute now in force can be shown to be plainly inconsistent with the provisions of the Constitution, which is the fundamental law, con-

trolling and restraining the government as well as the people, it is the duty of the judicial tribunal so to declare, and it is the right of the subject to have the benefit of it. It is, however, hardly possible too often to repeat the familiar sentiment, that, though this power of deciding on the constitutionality of legal enactments, is one clearly vested in the judicial department, it is to be resorted to and exercised with great caution and deliberation, and it is always to be presumed that a co-ordinate branch of the government has acted within the limits of its constitutional authority until the contrary shall clearly and satisfactorily appear.

"With these views of the Constitution, and the manner in which the powers confided by it to the Legislature are to be regarded, it becomes necessary to examine the various parts of the Constitution, which are supposed to be infringed by the enactment of the laws in question. In construing this Constitution, it must never be forgotten, that it was not intended to contain a detailed system of practical rules for the regulation of the government or people in after times; but that it was rather intended, after an organization of the government, and distributing the executive, legislative and judicial powers amongst its several departments, to declare a few broad, general, fundamental principles for their guidance and direction.

"Another general consideration is, perhaps, not of less importance, in understanding the genius and spirit of our Constitution, and it is this: that this declaration of rights and frame of government, composing together the Constitution, was not first prepared and drawn up by and for a people who were then, for the first time, establishing political and civil institutions for their security and government; it was rather a slight remodelling of a social system, by a people who had long enjoyed the protection of law and the security of social order, under a government, nearly as free, and practically nearly as popular as the lot of humanity would admit. The Constitution itself recognizes this condition of law and social order, and provides that all laws before adopted, used and approved in the Colony, Province, or State, should remain and continue in force, such parts only excepted as were repugnant to the rights and liberties contained in the Constitution itself. Each particular clause and provision of the Constitution, therefore, and especially in the declaration of rights, is to be expounded under the broad light thrown upon it by this constant reference, tacit or express, to established laws and institutions, and to the principles and maxims of civil liberty, secured and regulated by mild, equal and efficient laws.

"The Legislature are invested with full power and authority to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, either with penalties or without, so as the same be not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth. A large discretion is thus given to the legislature to judge what the welfare of the Commonwealth may require; and this power is restrained only so far as not to be expressly, or by necessary implication, repugnant to the Constitution. The power is the general rule, the restraint of it the specific exception.

"The first argument of the defendant was founded on the preamble of the Constitution, which announces one of its great objects to be to secure to individuals the power of enjoying, in safety and tranquillity, their natural rights, one of the most important of which is, that of acquiring, possessing and protecting property. This is one of those general truths, which both legislators and people should keep constantly in view, and therefore properly finds its place in a declaration of rights. But it is by no means repugnant to any salutary laws designed to regulate the means of acquiring property, and a large proportion of all the laws which have been passed, since the adoption of the Constitution, have related, more or less directly, to the acquisition, preservation and transmission of property. Indeed, such laws are necessary to define, secure, and give practical efficacy to the right itself. Traffic and commerce are no doubt among the means of acquiring property, and, as such, are entitled, under due regulation, to protection. To hold that they are not subject to regulation by law, would be a departure from the whole policy of the government, from the first settlement of the country. All the inspection laws, providing for the inspecting and marking of the principal products of our agriculture and manufactures, with a view to benefit our commerce in those articles at home and abroad; all laws made with a view to revenue, to health, to peace and

good morals, are of this description. So in regard to all those pursuits, occupations and trades, in the skilful and faithful performance of which the public have an interest, such as surgeons, physicians, attorneys, pilots, ferrymen, masters and conductors of steamboats, railroads, and very many others, especially in cities and populous towns. Such laws, though they impose salutary regulations upon trade, have never been deemed unconstitutional.

"It was suggested that, if selling spirit without license is immoral, it ought not to be licensed at all; if not immoral, it could not be constitutionally prohibited. This argument was not much pressed, nor can it be of much weight. It would abolish the distinction between *malum in se* and *malum prohibitum*. But many things are prohibited by law, either absolutely or *sub modo*, not because they are in themselves immoral, but because they tend to immorality, or other mischief, or inconvenience to the community, or to individuals.

"But the principal ground on which it is contended that the laws in question are repugnant to the Constitution, is that it is a violation of the 6th article of the declaration of rights. This article declares, that no man or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public, etc. The article is very familiar.

"In the first place, in regard to most of these licenses, they are granted to those who, in remuneration therefor, become responsible for the performance of very important duties to the public as innkeepers. And in regard to all, the licensed persons are compelled to come under regulations, in the observance of which the public have an interest. In this respect they are put upon the footing of pilots, ferrymen and others who do obtain exclusive privileges in consideration of services to be rendered at the time and in the manner most beneficial to the public.

"But the decisive answer is that the exclusive authority and power to sell spirit, by retail, is not conferred on the licensed person as a benefit or privilege to him, or with a view to give him an exclusive right; but solely because the peace and security, the morals and good order of the community, will be promoted by it, and the exclusive power, therefore, is collateral and incidental, and not one of the objects and purposes of the law. Many other laws do, in their effect and operation, necessarily confer benefits, more or less exclusive, upon individual citizens; but, this not being the design of the law, and the real object and obvious purpose of the law being to promote the public good, it cannot be considered obnoxious to the objection that it is repugnant to this article of the declaration of rights."

The statute of 1855 c. 215 is neither more nor less than a license law. It is more stringent in its provisions, and severe in its penalties than the former laws on this subject, but the general principle and purpose of the act are the same. Like them, it provides for the manufacture and sale of spirituous and intoxicating liquors, by persons to be legally licensed for that purpose, for certain specified useful objects, and prohibits the manufacture and sale by all other persons, or for any other purpose. The general argument which establishes the constitutionality of the former license laws, is, therefore, equally conclusive as to the general constitutionality of this statute. The constitutionality of its distinct clauses and provisions is a distinct subject of consideration.

In answer to the second clause of the first question proposed, I will again adopt the language of the S. J. Court, which is directly in point. In delivering the opinion of the Court in the case of Fisher v. McGirr and also, (1 Gray, 1), the Chief Justice says, (pp. 27, 28):

"We have no doubt that it is competent for the Legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be

injurious, dangerous or noxious; and by due process of law by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale or destruction of the noxious articles. Putrefying merchandise may be stored in a warehouse, where, if it remain, it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night; however secreted, a fire in the building would be sure to find it, and the lives and limbs of courageous and public-spirited firemen and citizens, engaged in subduing the flames, would be endangered by a sudden and terrible explosion. It is of the highest importance that such persons should receive the amplest encouragement to their duty by giving them the strongest assurance that the law can give them, that they shall not be exposed to such danger. This can be done only by a rigorous law against so keeping gunpowder, to be rigorously enforced by seizure, removal and forfeiture.

"The cases of goods smuggled in violation of the revenue laws, and the confiscation of vessels, boats and other vehicles, subservient to such unlawful acts, are instances of the application of law to proceedings *in rem*.

"The theory of this branch of the law seems to be this. That the property of which injurious or dangerous use is made, shall be seized and confiscated, because either it is so unlawfully used by the owner or person having the power of disposal, or by some person with whom he has placed and entrusted it, or at least that he has so carelessly and negligently used his power and control over it, that, by his default, it has fallen into the hands of those who have made and intend to make the injurious or dangerous use of it, of which the public have a right to complain, and from which they have a right to be relieved. Therefore as well to abate the nuisance, as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit or destroyed, as the circumstances of the case may require, and the wisdom of the legislature may direct. Besides, the actual seizure of the property intended to be offensively used, may be effected, when it would not be practicable to detect and punish the offender personally."

I may be permitted to add further, that laws for the seizure and confiscation of goods unlawfully used etc., are not novel or unusual in Massachusetts. They existed in our statute books before the revolution, have been frequently passed since, and still exist and are in force and practically applied. For several examples of such laws, besides those mentioned above by the Chief Justice, see Rev. Stat. c. 28 s. 28, ss. 30, 59, 62, 88, 117, 137, 153, 165, 176, 187, also ch. 118 ss. 20 *and seq.*

Question 2. Is there any constitutional objection to the mode of seizure and confiscation pointed out in sections 25, 26, 27, 28, 29 and 30 of the statute of 1855, ch. 215?

These sections are long, and contain numerous, not to say complicated, provisions and directions. Their object is to prescribe, with some minuteness of detail, the forms and mode of proceeding *in rem* and not *in personam*. They therefore contain no provision and grant no authority for the arrest, trial and conviction of the violator of the statute personally. The latter object is provided for by other sections.

But though these sections contain numerous and somewhat complicated provisions, and all the sections and clauses are parts of a system of measures to secure obedience to the statute by enforcing its penalties, yet all the parts and clauses are not so far dependent on each other, that, if one should be adjudged to be void, all the others must necessarily fall with it. Even

the same clause, when applicable in its terms to several subjects, may be void as to one subject and valid as to the others. This principle is clearly stated by the Chief Justice in delivering the opinion of the Court in the case of Commonwealth v. Kimball, 24 Pick. 359. That was an indictment for selling spirituous liquors by retail without license, contrary to R. S. c. 47 s. 3. The Chief Justice says (p. 362 :)

"But it is argued for the defendant, that the prohibition to sell is general and makes no distinction between the cases of a sale by the importer of imported spirits, in the original packages, supposing them under twenty-eight gallons, and the sale of spirits not imported, or not by the importer or not in the original packages. Be it so; what is the consequence? Supposing the law could be construed to be repugnant to the Constitution of the United States, in so far as it prohibited the sale of imported spirits by the importer in the original package, *it would be void thus far and no further;* and in all other respects conforming to the acknowledged power of the State government, it would be in full force. Whether legal enactments, some of which it is competent for the legislature to make, and others not, are contained in the same, or in different sections of the statute, can make no difference. It is not the defect of form, but of power, that invalidates any of them; it is, therefore, the subject matter, and not the arrangement of the language in which it is embodied, that is to be regarded in deciding whether any provision is constitutional or not. If, therefore, the defendant had offered to show, in his defence, that the spirits charged to have been illegally sold by him without license, contrary to the statute, were imported by himself, and sold in the original package, it would then have given rise to the question which has been mainly argued in the present case. But no such evidence was offered, nor has it been intimated, that such was the fact; on the contrary, it is, so far as appears by the report, the ordinary case of the sale of spirits at retail, either domestic distilled spirits, or foreign spirits which had been sold by the importer, and become mixed up with the general mass of that class of merchandise offered for sale in small quantities by the retailer."

The decision in the late case of Betsey J. Sullivan, which was founded on the 32d section of this statute of 1855, is also an example of the application of this principle. In that case, the court, according to the report of it in the Daily Advertiser, of June 20th, decided that, though the last clause of that section was void, yet the first clause was constitutional and valid. The two clauses, it will be observed, are parts of the same section and the same sentence, and yet the court decided that the two clauses were not dependent, and that one part was valid, and the other void. This principle is equally applicable to the construction and exposition of all other sections and clauses of this and all other statutes.

With these preliminary considerations, I now proceed to examine briefly the substance of the provisions of the several sections mentioned in the question, exclusive of the 29th, which I propose to reserve for a separate examination.

The 25th section prescribes, in connection with the statute of 1855, chapter 397, section 1, the mode of proceeding in order to obtain a search warrant; the substance and form of the complaint and warrant; the duty of the officer to whom the warrant is committed to seize and retain the liquor complained against, and the vessels containing the same, described in the complaint and warrant, until final action thereon.

It appears to me that this section is drawn with a careful regard to the constitutional provisions against unreasonable searches and seizures, and that it is so framed and guarded as to avoid all the successful objections, which were made to the constitutionality of the statute of 1852, chapter 322, in the case of Fisher v. McGirr. (1 Gray 1.)

The 26th section prescribes particularly the duty of the justice or court before which the warrant is returned. If, in the opinion of the justice or court, the value of the property seized shall not exceed twenty dollars, the justice or court must issue a notice in the form, manner, and substance required in that section, to all persons interested, commanding them to appear at a time and place specified, to answer to the complaint, etc. This section also requires that time and opportunity for trial and defence shall be given to persons interested. The jurisdiction, and manner, and form of the notice to be given, etc., where the value of the property seized, in the opinion of the justice or court before which the warrant is returnable, exceeds twenty dollars, are prescribed by a subsequent section.

By this 26th section, it appears that the first duty of the justice or court, after the return of the warrant, is to determine whether the value of the property seized does, or does not, exceed twenty dollars. This he will do on a hearing of the parties, if they wish to be heard, and on such evidence as he can have before him. This is a preliminary inquiry, merely for the purpose of ascertaining what tribunal has original jurisdiction. For this purpose, and for this purpose alone, the decision of the justice or court is conclusive. I am not aware that any constitutional objection can be successfully urged against this provision. The extent and limitation of the original jurisdiction of justices' courts, and all other courts in this Commonwealth, have always been considered as matters within the discretionary powers of the Legislature. The jurisdiction of justices under this 26th section, is limited to the same amount as has been usual in civil cases. The mode of determining the value of the property in question is also a matter of legislative discretion. It is by this section confided to the justice or court before which the warrant is returned, and this is the most simple and direct mode which could be adopted. Justices of the peace are judicial officers, supposed to be discreet, honest and impartial, and are sworn to the faithful discharge of their official duties. Their opinion on this question of value, is made conclusive as to original jurisdiction, but it is of no effect for any other purpose. In any other judicial inquiry as to the value, their opinion cannot be admitted as evidence. I see nothing, therefore, in this provision unconstitutional or unreasonable. A different and more complicated mode of ascertaining the value of goods seized, is provided by the Revised Statutes, chapter 118, sections 37, 38 and 39; but subsequent legislatures are not bound by those provisions. The other parts of the 26th section of the statute in question appear to me to be constitutional and unexceptionable.

The 27th section provides for a trial before the justice or police court. At the time and place appointed therefor by the notice, all persons claiming an interest in the property seized, are authorized to appear and make their claims, etc. Whether any person shall enter any claim or not, the justice or court must proceed to hear and determine whether the property seized is forfeited, and the judgment is to be rendered "upon the evidence presented at the trial." If a judgment of forfeiture is rendered, this section provides for the further disposition of the property, and for the payment of the costs of the proceedings. If the general principles and policy of the law, and the 25th and 26th sections are constitutional and valid, as they appear to me to be, so far as they provide for the seizure, etc., I am not aware that any plausible constitutional objection has been, or can be, urged against the validity of the 27th section.

The 28th section provides for a restoration and re-delivery to the owner, or person entitled to receive it, of all the property seized, which is not adjudged, on the trial, to be forfeited. I presume no objection will be made to the constitutionality and reasonableness of this section.

Passing for the present over the 29th section, I proceed to a consideration of the 30th section. This section provides, or is obviously intended to provide, for cases in which, in the opinion of the justice or police court, the value of the liquor seized and vessels containing it, exceeds twenty dollars. In such cases, this section provides that the justice or court before which the warrant is returned, shall issue a notice, *in the same manner and form* as directed in the 26th section, except that it must be made returnable to the Court of Common Pleas, in the same county having jurisdiction of criminal cases, or of the Municipal Court to be held in such county next after the expiration of fourteen days from the time of issuing the notice, which is to be served in the manner directed in the 26th section. The 30th section then proceeds to give express jurisdiction to the Court of Common Pleas, in cases in which the notice is returnable to that court, and to give directions as to further proceedings there, but does not give express jurisdiction to the Municipal Court in cases in which the notice is returnable to that court.

The only question arising on the construction and validity of this section is, so far as I know, the fourth question presented for my opinion, viz: Has the Municipal Court jurisdiction to try cases returned to it under the provisions of this section?

It appears to me that jurisdiction is given to the Municipal Court, by necessary implication, in the cases in which the notice is required to be returnable to that court. What are the objects and purpose of that notice, and for what purpose is the notice made returnable to the Municipal Court? The notice itself distinctly answers this question. It commands the owner of the liquor seized, and all other persons interested, to appear at the court named in the notice, at the time and place therein specified, then and there

"*to answer to said complaint, and for trial, and to show cause, if any they have, why such liquor should not be forfeited.*" From the language thus used in the notice prescribed in the 26th section, in connection with the obvious purpose and meaning of the 30th section, can there be the least plausible, not to say possible doubt, that the Legislature intended to give, and did give, by necessary and irresistible implication, jurisdiction of the case to the Municipal Court? The last clause of the 30th section, expressly giving jurisdiction to the Court of Common Pleas, is an independent clause, and does not affect or impair the jurisdiction which was given to the Municipal Court by the former clauses. If it is necessary, in all cases of the transfer of suits and prosecutions, by appeal or otherwise, from one judicial tribunal to another, to give *express* jurisdiction to the latter, I apprehend it will be found, that, in very many, if not in most cases of appeal, the appellate court has no jurisdiction of the case appealed. To me, therefore, it seems perfectly clear, that the court to which cases are transferred by provisions of law, whether so transferred by appeal, or otherwise, necessarily take and have jurisdiction of the cases so transferred.

I now return to the consideration of the 29th section, which provides, *(inter alia,)*

1. That any person claiming any *spirituous* liquors, whose claims shall not be allowed, or any person complained against, shall have the right of appeal, and to the same court, as if he had been convicted of a crime.

2. That, before his appeal shall be allowed, be shall recognize to the Commonwealth, in the sum of two hundred dollars, with a good and sufficient surety or sureties, to prosecute his appeal, etc., and to abide the sentence of the court thereon.

To both these provisions objections are made on constitutional grounds. To the first, that no appeal is granted except to a claimant of *spirituous* liquors; to the second, that the right of appeal there given is subjected to an onerous and unconstitutional condition; and that the effect of each is to deny or impair the claimant's right to a trial by jury. It is further objected that these unconstitutional provisions are fatal to any and all proceedings under the seizure clauses of the statute in question.

The mere denial of an appeal, in this or any other case, is not a violation of the Constitution. The right of appeal is not one which is secured by the Constitution. In Massachusetts, the right of appeal, both in criminal and civil cases, when it exists at all, is given and regulated by statute. (Commonwealth v. Dunham, 22 Pick. 11.) The Legislature may, therefore, in the exercise of their discretionary powers, deny an appeal entirely, or grant it either absolutely or on such terms and conditions as they may judge proper and reasonable in the due administration of justice. So far, therefore, as relates to the mere right of appeal, no party can complain, on constitutional ground, that it is not granted. It can be objected to only for its indirect effect in depriving the claimant of a trial by jury; and if he

has other legal means of obtaining such trial, the denial of an appeal is not unconstitutional.

Admitting, for the present, that a certain class of claimants are, by the practical operation and construction of this section, indirectly deprived of a jury trial, I will inquire, in the first place, whether this objection would be fatal to all proceedings under the seizure clauses of this statute? I am of opinion that it would not. By the principles governing the judicial construction and exposition of statutes, so clearly and distinctly stated by Shaw, C. J., in the case of the Commonwealth v. Kimball, before cited, it seems to be settled, that the provisions of a statute may, in their application to one class of subjects, be unconstitutional and void, and still, in their application to other classes, be constitutional and valid; and this was a governing principle in the decision of that case.

Upon this principle the objection to the proceedings could prevail only in that class of cases, if such there be, to which it especially applies, and could not prevail in favor of those to which it does not apply. It would seem, therefore, that proceedings may be legally instituted, a warrant issued, and liquor seized in all cases as provided in the 25th and 26th sections. Neither the complaint nor warrant states the value of the liquor to be seized under them. After the liquor is seized, and the warrant returned, the value of the property so seized is to be first ascertained. Suppose the liquor so seized to be wholly fermented intoxicating liquor, the value of the whole property so seized to be not more than twenty dollars, and the claimant not to be the person complained against. Then the constitutional objection may be made. If it is a valid one, it is an effectual bar to any decree or judgment of forfeiture by the justice or police court, and they can only order the property to be restored. This course of proceeding in such cases, seems to be strictly analogous to the one pointed out by the court, in the case of the Commonwealth v. Kimball. In all the classes of cases in which a jury trial may be had, the constitutional question now considered would be irrelevant.

But to what class, or classes of cases, if to any, does this constitutional objection apply?

1. It would not prevail to defeat a prosecution in which the value of the property seized exceeds twenty dollars, because they have a trial by jury in the higher court, without any appeal.

2. It would not prevail to defeat a prosecution before a justice or police court, in which spirituous liquors alone were seized and claimed, because, by this section, an appeal is expressly given to such claimant.

3. It would not prevail to defeat any prosecution in which the claimant is the person complained against as owner, etc., because an appeal is expressly given to the person so complained against.

4. It would not prevail to defeat any prosecution in which any part of the liquor claimed is spirituous, because in such case the claimant is a claim-

ant of spirituous liquors, to whom an appeal is expressly given, and an appeal carries the whole case to the appellate court.

5. It would apply, if at all, only in that probably small class of cases in which none of the liquor claimed is spirituous, in which the value of the whole property seized does not exceed twenty dollars, in which the claimant is not the person complained against, and in which a trial by jury could not be had by other means than by an appeal. Is there any such class?

It is possible that upon a reasonable construction of the statute it may be found that there is no such class, but upon this point I would speak with some hesitation and doubt. If by any fair and reasonable construction of the statute the constitutional rights of all persons interested can be saved, the Court will undoubtedly adopt such construction. Now it is possible that the term "*spirituous*" as used in the 29th section, may be construed to include all *intoxicating* liquors, as the latter derive their intoxicating quality from the spirit they contain. Upon such construction the right of appeal would be given to all claimants. It may be that prosecutions under these sections may be considered so far criminal prosecutions against the claimants; and the judgment of forfeiture so far in the nature of a conviction or sentence as to bring the case within the Revised Statutes, c. 138, s. 1, or some other statute granting appeals in criminal cases. It may be that these cases will be considered as falling within the provisions of the Revised Statutes, c. 118, s. 33. It may be that in these cases a trial by jury may be had by means of the laws relating to reviews and new trials, exceptions, or by replevin or some other form of action. If, by any of these or other means, the claimant can have a trial by jury, his constitutional rights are probably saved; but if not, I am inclined to the opinion that, in the class of cases now under consideration, the Justice or Police Court cannot decree a forfeiture, but must order a re-delivery to the person entitled to the possession.

Question 3. Is there any constitutional objection to the *proviso* in the 29th section of the act, which requires the appellant, before his appeal is allowed, to recognize to the Commonwealth in the sum of two hundred dollars, to prosecute his appeal at the Court appealed to, and to abide the sentence of the Court thereon?

I am of opinion that the condition annexed to the allowance of the appeal is constitutional and valid. I have arrived at this conclusion,

1. From its reasonableness.

2. From its analogy to appeals in civil cases, and

3. From contemporaneous and long continued construction and usage.

1. It is reasonable that the Commonwealth should require some security that the appeal is claimed *bona fide*, and not merely for delay, from a litigious spirit, or to evade the execution of the laws. The allowance of the appeal, if well taken, vacates and supersedes the judgment appealed from. In prosecutions *in rem* under this statute, the claimant is not in the custody of the Court. He is not bound to be personally present. He may, I

presume, make his claim, enter his appeal, and recognize by attorney. The Court, therefore, have it not in their power, to commit him, and therefore, unless he is required to recognize before his appeal is allowed, the whole proceedings before the justice may be annulled and become nugatory, and the administration of justice thus be entirely defeated.

2. The same condition precedent to the allowance of an appeal is adopted and required in all civil cases. The expression of the declaration of rights in relation to trials by jury is as strong in civil as in criminal cases, (see Art. 12 and 15,) and yet the general rule in cases of appeal in all civil actions is, that the appellant shall, *before the allowance* of his appeal, recognize, etc., with sufficient surety or sureties, etc., (R. S. c. 85, s. 10, and c. 82, s. 8). If then the condition on which the appeal is to be allowed by the 29th section of the statute in question is unconstitutional, because it may, by possibility, indirectly prevent the appellant from having a trial by jury, the same condition annexed to the allowance of an appeal in civil cases is also unconstitutional, for the same reason, and all our legislators, judges and magistrates, from the adoption of the constitution to the present day, have labored under a gross mistake as to the constitutional rights of the people of this Commonwealth.

3. The conclusion as to the constitutionality and validity of the condition in question is confirmed by contemporaneous construction and long continued usage. It is not an unprecedented or novel provision of our laws. By a colonial law passed more than two centuries ago, a right of appeal was granted in criminal cases, *provided* the appellant "put in security to prosecute it to effect," etc., and "for his good behavior and appearance," etc. Again, more than a century and a half ago, in 1699, a provincial statute provided that any person sentenced for any criminal offence by a justice of the peace, etc., may appeal, etc., the appellant recognizing with sureties, etc., to appear and prosecute, etc. The same statute provided for appeals from the court of sessions, etc., *provided (inter alia)* the appellant enter into recognizance with sureties to prosecute his appeal, etc. This ante revolutionary statute continued in force until and after the adoption of the Constitution, and until revised and substantially re-enacted by statute 1783, c. 51, s. 3. So by the statute 1832, c. 130, s. 3, no appeal was allowed, or held valid, unless the appellant should recognize with sureties, etc. The validity of this condition was recognized by the Supreme Judicial Court in the case Commonwealth v. Dunham, (22 Pick. 16.) So by the R. S. ch. 118, s. 33, on this very subject of seizing and libelling goods forfeited, either party aggrieved could appeal, etc., "*and the appeal shall be conducted in all respects like appeals in civil actions.*" In none of these statutes was there any provision for imprisoning the appellant until he should recognize. The statute 1783, c. 51, continued in force and in full practical operation in all our courts until the adoption of the Revised Statutes in November, 1835; more than half a century after the adoption of the Con-

stitution, and the passing of the statute of 1783. By the Revised Statutes, the then novel provision, that the appellant should be committed until he should so recognize, etc., was introduced. This change was made by the revising commissioners, as appears by their report, not on *constitutional*, but on other grounds. The change was not extended to civil actions, probably because the appellant would not be in the custody or power of the court, and therefore could not be committed.

But even if the condition annexed to the allowance of appeal, as provided in the latter clause of the 29th section of the statute in question, is unconstitutional and void, (which I cannot suppose to be possible,) still this would not annul or affect the right of appeal expressly granted by the first clause. And if, in consequence of the failure of the appellant to recognize, the justice should refuse to allow the appeal, still as the appellate court is to judge in the last resort, whether the party had a right of appeal, they will entertain the appeal, notwithstanding such disallowance, and the judgment of the lower court will be vacated. If then the condition of the appeal imposed on the appellant by the Legislature, is void, he is by the first clause of the section entitled to an *unconditional* appeal, unless a constitutional condition is prescribed by some other statute provision. (See 22 Pick. 11, before cited.)

Question 4. Under the 30th section of said act will the Municipal Court have the jurisdiction to try cases returned to it in the same manner as the Court of Common Pleas?

I have given my views of this question in my examination and remarks relating to this 30th section in a preceding page.

Question 5. Does the 20th section of the said act conflict with the constitutional right of Congress to regulate foreign commerce, and commerce between the states?

I am of opinion that it does not. The question appears to me to be conclusively settled by judicial decisions of the highest authority.

The leading case on this subject is that of Brown v. the State of Maryland, (12 Wheat. 443). That was an indictment against the *importer* for selling a package of goods in the form in which it was imported, contrary to the statue of Maryland requiring all *importers* of foreign goods, before selling the same by wholesale, bale, etc., to take out a license, for which he was required to pay fifty dollars. The Court held that this law of Maryland was void, but *Marshall, C. J.*, in delivering the opinion of the Court, says, that this state of things would be changed if he, the importer, *sells the goods*, or otherwise mixes them with the general mass of property of the State, by breaking up the packages, etc. "In the last case," he adds, "the importer has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law (of the States) may treat them as it finds them."

This was, perhaps, an extrajudicial opinion, but even such an opinion of

the late C. J. Marshall is entitled to great respect: and this opinion has since been sustained, adopted and acted upon by the judicial tribunals of the U. States and of the several states. In Massachusetts, the question was distinctly presented in the S. J. Court in the case of the Commonwealth v. Kimball, (24, Pick. 359,) and decided according to the opinion of Chief Justice Marshall, above cited.

In the Supreme Court of the United States, in the several cases of Thurlow v. the State of Massachusetts, Fletcher v. the State of Rhode Island and Pierce v. the State of New Hampshire, this question, as to the constitutionality of the license laws of those States, was very fully argued and considered, and the judges who pronounced their opinions *seriatim*, unanimously concurred in declaring the license laws of those States to be constitutional and valid. TANEY, C. J., says:

"If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

In the same case, *McLean* says;

"After the import shall have passed out of the hands of the importer, *whether it remain in the original package, or cask, or be broken up*, it becomes mingled with other property in the State, and is subject to its laws."

In the N. Hampshire case, the property sold without license was a barrel of gin, imported from Massachusetts, and sold in the same cask in which it was imported, and yet it was held that,

"Though the gin sold was imported from another State, and Congress have also clearly the *power* to regulate such importations, yet, as Congress had made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory; and a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

The 2d and 4th sections of the statute now in question, are drawn in careful conformity with these opinions and decisions. It is true that the expression in the 20th section is general, but its meaning is limited and controlled by the 2d and 4th sections. If the liquor brought into the State for the purposes, and under the circumstances mentioned in the 20th section, is brought in by the importer, and in the original casks, etc., it is protected by the 2d and 4th sections, and is not brought in, etc., with the intent to sell "*in violation of this act*," but in conformity thereto. I am therefore of opinion that the 20th section of this act is fully authorized by the Constitution and laws of the United States.

Having thus given, at some length, my opinion and views of the several questions which you did me the honor to propose for my consideration, I conclude by subscribing myself, with much respect,

Your ob't servant,

JOHN M. WILLIAMS.

July 31, 1855.